

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE: ) Bankruptcy No. 17-22532  
Cherry Logistics Corp., ) Chapter 7  
Debtor. ) Judge Janet S. Baer

## **NOTICE OF MOTION**

TO: See attached Service List

YOU ARE HEREBY NOTIFIED that on Wednesday, October 18, 2017, at 9:30 A.M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Janet S. Baer in Room 615, Everett McKinley Dirksen United States Courthouse, Chicago, Illinois, and then present the attached motion, at which time you may appear if you see so fit.

DREYER, FOOTE, STREIT,  
FURGASON & SLOCUM

By /S/ Michael W. Huseman  
Michael W. Huseman

## **PROOF OF SERVICE**

I, Michael W. Huseman, at attorney, certify that pursuant to Section II, B, 4 of the Administrative Procedures for the Case Management/Electronic Case Filing System, service of the above Notice of Motion together with a copy of the Motion for Relief from Automatic Stay on all persons identified on the Service List attached, was accomplished through the Court's Electronic Notice for Registrants, and through regular mail for non-registrants, before the hour of 5:00 P.M., September 28, 2017

By /S/ Michael W. Huseman

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IN RE: ) Bankruptcy No. 17-22532  
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## **MOTION FOR RELIEF FROM AUTOMATIC STAY**

NOW COMES Cutberto Valenciano, Jr. (“Valenciano”), by his attorney Michael W. Huseman of Dreyer, Foote, Streit, Furgason & Slocum, P.A., and pursuant to Bankruptcy Rule 4001 states as follows:

1. On July 28, 2017, Cherry Logistics Corp. (“debtor”) filed this voluntary chapter 7 case.
  2. Consequently, this Court has jurisdiction over this proceeding pursuant to 28 U.S.C. 1334 and 11 U.S.C. 362.
  3. On July 11, 2017, Valenciano had filed a complaint for personal injuries against debtor and two other defendants in the Circuit Court of Kane County, Illinois, as Case Number 2017 L 353 (the “personal injury lawsuit”). A true and correct copy of the complaint is attached as Exhibit 1.
  4. On September 20, 2017, debtor filed a motion to stay the lawsuit “until plaintiff removes this matter from the automatic stay of bankruptcy court.” A true and correct copy of the motion to stay is attached as Exhibit 2.
  5. In the motion to stay, debtor states that it has “a policy limit of \$1,000,000.” *Ex. 2,*

6. By this Motion, Valenciano requests relief from the automatic stay for cause under Section 362(d)(1) for the limited purpose of prosecuting the personal injury lawsuit against debtor.

7. The Bankruptcy Code does not define “cause” for purposes of Section 362(d)(1). “Cause” is therefore a discretionary matter to be determined on a case by case basis. *In re Benalcazar*, 283 B.R. 514, 535-536 (Bankr. N.D. Ill. 2002).

8. The Seventh Circuit balances the costs and benefits of continuing the stay when litigation is pending in another forum, identifying three factors: (1) the potential prejudice to the debtor or the bankruptcy estate from allowing the non-bankruptcy litigation to continue; (2) the relative hardship to the debtor and to the party seeking relief; and (3) the movant’s probability of prevailing on the merits in the litigation. *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 735 (7<sup>th</sup> Cir. 1991).

9. Neither the debtor nor the bankruptcy estate will be prejudiced if the personal injury is allowed to continue because debtor has acknowledged the existence of a \$1,000,000 insurance policy, which greatly exceeds any potential liability that debtor would face.

10. Valenciano, on the other hand, will be prejudiced if the automatic stay remains in place because critical evidence and witnesses could be lost due to the passage of time. *See, e.g., In re Bock Laundry Mach. Co.*, 37 B.R. 564, 567 (Bankr. N.D. Ohio 1984) (“Personal injury litigation can consume a considerable length of time before a final award is made. Requiring the Movants to forego prosecution of their claims until such time as the stay is no longer in effect will effectively deny them an opportunity to be heard.”).

11. Valenciano has a probability of prevailing on the merits. In a case involving a preliminary injunction, one court has noted that “demonstrating likelihood of success on the merits is not to prove that it is certain to prevail at trial. It will ordinarily be enough that the plaintiff has

raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation.” *In re Rare, LLC*, 298 B.R. 762, 769 (Bankr. D. Colo. 2003).

12. In this case, Valenciano slipped in water and suffered injuries at a property at which debtor was performing maintenance and related services, including but not limited to power washing the floor. The proximate causes of Valenciano’s injuries include, among other things, debtor’s failure to warn against a dangerous condition at the property and debtor’s failure to exercise reasonable control in the hiring, supervision, and control of its agents, employees, and subcontractors.

13. Valenciano request waiver of ten-day stay provided in Bankruptcy Rule 4001 (a)(3).

WHEREFORE, Cutberto Valenciano, Jr. moves for the entry of an order modifying the automatic stay to permit him to proceed with his state court personal injury lawsuit; declaring that the stay set forth in Bankruptcy Rule 4001(a)(3) is not effective with respect to the relief granted in this order; and for such other relief deemed fair and reasonable by this Honorable Court.

DREYER, FOOTE, STREIT,  
FURGASON & SLOCUM

By /s/ Michael W. Huseman  
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